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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

KENNETH DWAYNE MANNING,

Defendant and Appellant.

F077216

(Super. Ct. No. BF162622A)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. John D. Oglesby, Judge.

Melissa Baloian Sahatjian, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans and Jeffrey A. White, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Levy, Acting P.J., Detjen, J. and Snauffer, J.

A jury convicted appellant Kenneth Dwayne Manning of possession of a firearm by a felon. (Pen. Code, § 29800, subd. (a)(1)).¹ In a separate proceeding, the court found true three prior prison term enhancements (§ 667.5, subd. (b)) and allegations that Manning had a prior conviction within the meaning of the “Three Strikes” law (§ 667, subds. (b)-(i)).

On March 13, 2018, the court granted Manning’s motion to dismiss two of his prior prison term enhancements and it sentenced him to an aggregate prison term of seven years: a doubled aggravated term of six years and a one-year prior prison term enhancement.

On appeal, Manning contends the court erred in allowing the prosecutor to introduce evidence of his gang membership. We affirm.

FACTS

On December 23, 2015, Parole Agent Jaime Sazo arrested Manning during a parole search after seeing him place a handgun under a mattress.

On May 26, 2016, the Kern County District Attorney filed an information charging Manning with being a felon in possession of a firearm, a serious felony enhancement (§ 667, subd. (a)), and the enhancements and allegations the court found true.²

Prior to trial, the court granted the defense’s motion in limine prohibiting the prosecutor and his witnesses from suggesting that Manning was a gang member. During the trial, Sazo testified that he supervised parolees who were on GPS monitoring, which required them to wear an ankle bracelet monitor. As part of his duties as a parole agent, Sazo made home visits about twice a month.

¹ All further statutory references are to the Penal Code, unless otherwise indicated.

² The serious felony enhancement was subsequently dismissed at the request of the prosecutor.

On December 16, 2015, Sazo was assigned to supervise Manning. He met with Manning that day at the parole office and at the apartment where Manning was living. At the office, Sazo gave Manning the GPS equipment and explained the conditions of GPS and how to charge the equipment. During the home visit, Manning showed Sazo the primary room in which he would be sleeping. Manning told Sazo he was going to be sharing that bedroom primarily with his brother, but that he also had access to other rooms located across from that room.

On December 23, 2015, at approximately 7:40 p.m., Sazo made an unannounced visit to Manning's residence. Sazo knocked on the door and a man answered. The man led Sazo to the room where Manning was staying and entered the room. Through the partially open door, Sazo saw the man bend down and whisper something in Manning's ear as Manning sat on a bed playing video games.³ Manning stood up, reached into his waistband, and retrieved a silver object. He placed the object underneath the mattress he had been sitting on and sat back down. Sazo entered the room and ordered Manning to stop playing video games and the other man to step outside. Sazo had Manning lift the mattress. Under the location where Manning had been sitting, Sazo saw a silver revolver. Sazo ordered Manning to drop the mattress and to keep his arms up. He arrested Manning at gunpoint and called for backup.

Bakersfield Police Officer Edgar Galdamez testified that after arriving on the scene, he looked under the mattress where Manning had been sitting, found a silver revolver loaded with six .38-caliber bullets, and seized it. The parties stipulated that Manning suffered a prior felony conviction prior to December 2015.

Manning testified that that in 2013 he was convicted of a crime of moral turpitude and in 2007 of commercial burglary. He was paroled on November 27, 2015, and began

³ Sazo testified that he had a clear view of Manning's hands and waistband when this occurred.

living in Tasha Williams's apartment. Manning slept in a room with his daughter. Many people would go to the apartment and stay there. According to Manning, Williams's son, Davion, was the man who answered the door when Sazo went to the apartment unannounced.

Manning was not on GPS monitoring when he was initially paroled. When he went to the parole office, he was told to go see Sazo. Manning asked why his parole officer was being changed and Sazo replied that the reason for the change was that he was being placed on GPS monitoring. Manning wondered why he was going to be monitored because he had already done his time on the charge for which he was paroled. He did not like being monitored because he had to wear an ankle bracelet and he could be violated and returned to prison if the monitor "went dead" or was tampered with. Manning became upset with Sazo because Sazo "stereotyped" him. Sazo also became upset and they argued. The two men "rubbed each other the wrong way" and Manning could tell Sazo did not care much for him. However, even though they "kind of bumped heads[,]," Manning did not say anything disrespectful to Sazo.

On December 23, 2015, Williams and Davion were having a party at the apartment and more than 15 people he did not know were there. According to Manning, the room where the revolver was found belonged to Davion and Manning did not stay there. Right before Sazo arrived, Manning walked out of his daughter's room and plugged the GPS monitor's charger to an electrical outlet in Davion's room where the revolver was found. The cord was long enough to allow him to sit on a washer and dryer next to the room while the ankle bracelet charged up. Manning was unaware if anyone in the house had a firearm and he denied putting the revolver under the mattress.

When Davion announced that Sazo was there, the people in the room where the revolver was found got up and walked out. Manning jumped off the machines and as he got the monitor's charger he looked up and saw Sazo. Manning did not have a firearm in his waistband.

During cross-examination, the prosecutor asked Manning what he and Sazo discussed that caused Manning to say that Sazo stereotyped him. Manning replied that “it was indicated yesterday that [they] were never to use that or bring that up.”

After a sidebar, during renewed cross-examination Manning reiterated that during their meeting at the parole office, he “butted heads” with Sazo about being placed on GPS monitoring and he again explained why he felt it was unfair that he would be monitored. The prosecutor then asked Manning if he had asked Sazo why Sazo put him on GPS monitoring and Manning replied that he did. When the prosecutor asked Manning what Sazo said, the following colloquy occurred:

“[MANNING]: Again, I was told yesterday we weren’t able to talk about it.

“[PROSECUTOR]: We are allowed to talk about it.

“[MANNING]: He just looked at me and said, ‘because you’re a gang member, that’s why.’

“[PROSECUTOR]: What was your response to that?

“[MANNING]: My response to that was, no, I wasn’t. ... He told me that I that I was an East Side Crip gang member. I said ‘how can I be an East Side Crip gang member? I’m not even from Bakersfield.’ ”

Manning further testified that he and Sazo argued and used profane language until other agents came in the office and told him to calm down. Manning believed Sazo was biased against him.

During a break in the testimony, the court explained, outside the presence of the jury, that it allowed the prosecutor to ask about Manning’s gang status being the basis for the GPS monitoring which tied “into the motivation of Agent Sazo and supervising [Manning] and a possible motive for Agent Sazo to fabricate evidence in this particular case.” A while later the court stated:

“I agreed [with the prosecutor] that [Manning]’s testimony had opened it based on two occasions. One, by complaining about the GPS and

that this was an unreasonable condition imposed upon him by [Parole] Officer Sazo and was suggested that was based upon some malice or grudge that Parole Officer Sazo had against [Manning].

“And then later [Manning] ..., on his own, stopping from mentioning his identification as being a gang member is the basis for it. [Manning] again brought up that there was an underlying issue. At that point on both grounds independently and certainly both grounds together, the [c]ourt believed that it was appropriate to allow this issue to be flushed out in front of the jury so the jury has a complete understanding of it.

“And I think it makes it more—as it’s come out, I think it becomes more understandable to the jury what was going on. And obviously you could argue it’s prejudicial to [Manning] because of the gang status, but when these issues are brought up it reaches a point where the [c]ourt is no longer willing to redact or limit evidence especially in a cross-examination environment.”

Sazo testified in rebuttal that he did not have a personal grudge against Manning and that Manning’s case was brought to him by another agent to see about placing him on a GPS monitor. After talking to other parole agents and reviewing documents, Sazo decided to place Manning on GPS monitoring because he met the criteria for being placed on “gang GPS.” When informed that he was going to be on the “gang GPS,” Manning became upset, but they did not argue about it.

DISCUSSION

Manning contends the court abused its discretion in admitting evidence of his gang membership because the evidence was more prejudicial than probative. We disagree.

Evidence Code section 352 provides:

“The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.”

“[A]s [a] general rule, evidence of gang membership and activity is admissible if it is logically relevant to some material issue in the case, other than character evidence, is not more prejudicial than probative and is not cumulative. [Citation.] Consequently,

gang evidence may be relevant to establish the defendant's motive, intent or some fact concerning the charged offenses other than criminal propensity as long as the probative value of the evidence outweighs its prejudicial effect. ([Citation] see generally Evid. Code, § 352.) 'Evidence of the defendant's gang affiliation—including evidence of the gang's territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like—can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime. [Citations.]' [Citation.] Nonetheless, even if the evidence is found to be relevant, the trial court must carefully scrutinize gang-related evidence before admitting it because of its potentially inflammatory impact on the jury. ([Citation; *People v. Carter* (2003) 30 Cal.4th 1166, 1194 [evidence of defendant's gang membership although relevant to motive or identity creates a risk the jury will improperly infer defendant has a criminal disposition and is therefore guilty of the charged offense and thus must be carefully scrutinized].)" (*People v. Albarran* (2007) 149 Cal.App.4th 214, 223–224.)

Agent Sazo's credibility was essential to the prosecution because his testimony that he saw Manning take a silver object from his waistband and place it under the mattress where the revolver was found was not corroborated by any other witness. Manning attempted to undermine Sazo's credibility by suggesting he was biased against him and, as proof, he cited Sazo's conduct in putting him on GPS monitoring, which Manning disliked and severely restricted his movements. Thus, the evidence that Manning was a gang member was relevant to show that Sazo had a legitimate reason for placing Manning on GPS monitoring and to counter Manning's suggestion that such placement indicated Sazo was biased against him. It was also relevant to impeach Manning because it tended to show that his claim that Sazo was biased against him was not true. Thus, the record supports the trial court's implicit finding that the evidence of Manning's gang membership was probative. Moreover, the prejudicial effect of the gang evidence was minimal because it consisted only of Sazo's identification of Manning as a

gang member. Thus, the evidence also supports the court's implicit finding that the probative value of the evidence outweighed its prejudicial impact.

Manning relies on *People v. Bojorquez* (2002) 104 Cal.App.4th 335 (*Bojorquez*), and *People v. Mestas* (1993) 20 Cal.App.4th 1482 (*Mestas*), to contend the introduction of evidence of his gang membership was prejudicial. In *Bojorquez*, the appellate court found that extensive "testimony ... about the criminal tendencies of gangs—appellant's in particular—and about their members' unwillingness to testify against each other and inclination to eliminate adverse witnesses lacked substantial probative value." (*Bojorquez, supra*, at p. 344.) *Bojorquez* is inapposite because the gang testimony here consisted only of Manning's alleged membership in a gang and, as discussed above, that evidence was probative with respect to an issue in the case.

In *Mestas*, to show a witness's bias toward the defendant, the prosecution's gang expert testified that the defendant and a witness were members of the same gang. (*Mestas, supra*, 20 Cal.App.4th at p. 1494.) On appeal, the *Mestas* court found the lower court abused its discretion by admitting this evidence, in large part, because other evidence established a close personal relationship between the defendant and the witness, thus making the evidence of gang membership "cumulative." (*Id.* at p. 1495.) *Mestas* is inapposite because the evidence of Manning's gang membership was not cumulative. Thus, we conclude that the court did not abuse its discretion when it allowed the prosecutor to elicit from Manning evidence of his alleged gang membership.⁴

Moreover, the erroneous admission of gang-related evidence is not prejudicial unless "it is reasonably probable that a result more favorable to appellant would have

⁴ In *People v. Avitia* (2005) 127 Cal.App.4th 185 (*Avitia*), the appellate court found that the trial court prejudicially erred in allowing the prosecutor to introduce evidence that investigating officers found gang graffiti in the defendant's room. (*Id.* at p. 194.) In his reply brief, Manning cites *Avitia* to contend that the trial court here prejudicially erred. *Avitia* is inapposite because, unlike the instant case, the *Avitia* court found that gang evidence was not relevant to any issue. (*Id.* at p. 193.)

occurred had the objectionable gang testimony not been admitted.” (*Bojorquez, supra*, 104 Cal.App.4th at p. 345.)

Agent Sazo unequivocally testified that he saw Manning take a silver object from his waistband and place it under the mattress where the revolver was found. The only evidence contradicting his testimony was Manning’s self-serving testimony that he was not in the room where the gun was found when Sazo contacted him at the apartment. However, Manning was impeached with two prior felony convictions. Further, as noted above, the gang evidence was minimal and limited to Sazo’s allegation that Manning was a gang member, which Manning denied. Thus, any error in admitting the evidence was harmless.⁵

DISPOSITION

The judgment is affirmed.

⁵ Manning contends that the admission of the gang evidence violated his federal due process rights. He is wrong.

“To prove a deprivation of federal due process rights, [a defendant] must satisfy a high constitutional standard to show that the erroneous admission of evidence resulted in an unfair trial. ‘*Only if there are no permissible inferences the jury may draw from the evidence can its admission violate due process.* Even then, the evidence must “be of such quality as necessarily prevents a fair trial.”’ (*Albarran, supra*, 149 Cal.App.4th at pp. 229–230, italics added.) Since the jury could draw the permissible inference from the evidence of Manning’s gang membership that Agent Sazo was not biased against him, the introduction of the gang evidence did not violate Manning’s federal right to due process.